SUPREME COURT OF THE UNITED STATES.

No. 34.—October Term, 1925.

Frederick C. Hicks, Alien Property Custodian, et al., Appellants, *vs.* Edwin W. Poe, et al.	Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

[November 16, 1925.]

Mr. Justice Brandeis delivered the opinion of the Court.

This suit for an accounting was begun in the federal district court for Maryland on June 12, 1920, by the receivers of the United Surety Company, a corporation of that State, against the Munich Re-Insurance Company, a Bavarian corporation. The controversy arose out of a written agreement entered into by the companies in 1906. There had been active litigation in the Maryland courts where much became *res judicata*. See *Munich Re-Insurance Co.* v. *United Surety Co.*, 113 Md. 200; 121 Md. 479; *Poe* v. *Munich Re-Insurance Co.*, 126 Md. 520. This suit was then begun under § 9 of the Trading with the Enemy Act, October 6, 1917, c. 106, 40 Stat. 411, 419 as amended, because the receivers sought to reach funds of the Munich Company in the possession of the Alien Property Custodian. The District Court after careful opinions entered a decree for the receivers for $189,517.16 with interest. 276 Fed. 949; 293 Fed. 764. The Court of Appeals affirmed it without opinion. 293 Fed. 766. The appeal to this court, allowed January 7, 1924, was taken as of right under § 241 of the Judicial Code. We find no reversible error. Two matters only require mention. Neither presents a question federal in its nature.

The United engaged in the business known as surety, fidelity and burglary insurance. The Munich, by what is called a participation contract, agreed with it to assume one-third of the liability on every such risk written during a period of five years. The management of the business was to be left to the United without restriction. Upon an annual accounting the Munich was to receive one-third of any profits or pay one-third of any losses. A decree entered against the Munich in the state court for losses incurred

during the five-year period had been satisfied. This suit is for losses incurred after its expiration on insurance of the United then still outstanding. The company had been unsuccessful. The state court after the expiration of the five-year period appointed receivers who proceeded to wind up the business. They sought in vain to re-insure all outstanding risks. Then, with the approval of the court, they secured, so far as possible, cancellation of the outstanding insurance by returning unearned premiums. The losses on account of which this suit was brought were on risks entered into during the existence of the participation contract and remaining unexpired upon its termination and which the receivers did not succeed in getting cancelled. The Munich argues that by the course pursued the assets were wasted through returning the unearned premiums on good risks, and that thus the poor risks were left unprotected; insists that it was entitled to have all the insurance carried to its expiry; and contends that the receivers, by securing the cancellation of much of it for the purpose of winding up the business, committed a breach of the participation contract which released it from further liability. The contention is unfounded. The participation contract did not restrict the discretion to be exercised by the United, and its receivers, in the conduct of the business or in winding it up after the termination of the agreement. The case of *Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U. S. 581, upon which appellants rely, is without application.

There is a further contention that, because the United has not paid to its creditors any part of the amounts due on its contracts, and is likely to pay only twenty-five cents on the dollar, the Munich is under no liability to pay to it anything on account of losses incurred thereunder or, in any event, more than a *pro rata* share of the payments actually made by the United. The Munich became a re-insurer. The liability of a re-insurer is not affected by the insolvency of the re-insured company or the inability of the latter to fulfil its own contracts with the original insured. *Allemania Fire Insurance Co.* v. *Firemen's Insurance Co.*, 209 U. S. 326. The participation contract differs from customary re-insurance in this. The Munich instead of receiving premiums and paying its share of losses was to participate in profits and losses. The difference is not one which affected the scope or character of the Munich's obligation.

Affirmed.